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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1950

No. 575

NETHERLANDS MINISTRY OF TRAFFIC,
DIRECTORATE GENERAL OF SHIPPING,

Petitioner,

—VS.—

THOMAS STRIKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 23rd, 1951.

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The NETHERLANDS MINISTRY OF TRAFFIC, DIRECTORATE GENERAL OF SHIPPING prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 29, 1950.

Opinions Below

The opinion of the District Court (R. 1117-1143),* is reported in 90 F. Supp. 534. The majority opinion of the Circuit Court of Appeals (R. pp. 393-399), and the dissenting opinion (R. pp. 399-400) are reported in 185 F. 2d 555.

* References are either to folios or to pages of the record unless otherwise indicated.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 29, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

Questions Presented

1. Whether the Courts below erred in extending the doctrine of *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, to a longshoreman injured on shore.

2. Whether the rights of a longshoreman injured on shore should not be determined under the State Compensation Law and the remedies afforded by it, rather than have the maritime doctrine of unseaworthiness of a vessel extended to him.

3. Whether in a suit in a common law court, a plaintiff may recover where he himself is found to be contributorily negligent.

Statement

This action was tried on the civil side of the District Court, Southern District of New York. Thomas Strika, a longshoreman employed by the Jarka Corporation was injured while working on Pier 5, Hoboken, New Jersey on March 15, 1947 (R. 58). At the time of his accident, Strika and fellow longshoremen were engaged in replacing a "pontoon hatch cover" from where it had been earlier placed on the pier to the deck of the SS "Zuiderkruis" owned by the petitioner (R. 324). The pontoon hatch cover was approximately twenty feet long, six feet wide and

about eighteen inches thick and weighed approximately one ton (R. 73, 916). To replace this cover, the longshoremen used two "bridles", each of which consisted of two legs of steel wire about sixteen feet long (R. 75-77, 600). These legs were joined to a steel ring at one end and were fitted with hooks at the others (R. 75-77). These hooks fitted into slots in the corners of the pontoon hatch cover (R. 665-666). Two sets of bridles were used (R. 75). The rings from each bridle were then placed in a hook attached to a fall and by means of winches, the hatch cover was started to be moved to the ship's deck (R. 85). The rings of the bridles were not fastened together by the longshoremen (R. 226-227). As the hatch cover was raised about four feet, one of the rings slipped off the hook, causing the cover to drop on Mr. Strika's leg, necessitating an amputation (R. 105). Strika applied for and was awarded compensation benefits under the State of New Jersey Workmen's Compensation Law (R. 860). No claim for benefits was made under the Longshoremen and Harbor Workers' Act (R. 861).

Seven separate questions were submitted by the trial court to the Jury which answered them (R. 1031-1033), in substance as follows:

1. The defendant furnished the bridles used to lift the pontoon hatch cover.

2. The bridles were unsuitable for lifting the hatch cover.

3. The unsuitability caused or contributed to the plaintiff's injury.

4. The shipowner did not know nor have reason to know that the bridles were unsuitable or that they might cause injury to someone such as the plaintiff.

5. The plaintiff's damages were $75,000.00.

6. The plaintiff's fault contributed to his injury.

7. The proportion of the plaintiff's fault was ten per cent.

Upon these special findings the District Court directed judgment for the plaintiff and denied the defendant's motion for judgment (R. 1143). By a two to one decision, the Court of Appeals affirmed this judgment. The basis for the District Court's decision was that while recognizing that this Court in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85 (*supra*) especially at p. 99, footnote 17, left undecided the question of whether the doctrine of unseaworthiness "extends to injury incurred ashore by a stevedore", the District Court felt that the rationale of the *Sieracki* case "clearly embraces the longshoreman on the pier engaged in loading or unloading the ship" (R. 1137).

The majority of the Court of Appeals in affirming the District Court's judgment held (R. p. 398):

> "The breach of the 'obligation' to furnish a seaworthy ship is a tort; • • • From this the defendant argues that since an action upon such an implied warranty is only a tort, the maritime law can have no jurisdiction over a breach of it occurring upon land; that being, of course, an accepted constitutional limitation upon maritime law. We should have found this a serious obstacle were it not for *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* and the *ratio decidendi* of *Swanson* v. *Marra Brothers, Inc., supra;* but those decisions appear to us to settle it that such a tort, arising as it does out of a maritime 'status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land. For it seems to us to follow, if Congress has power to impose liabilities in favor of seamen for lapses of care on shore, that Congress at

least would have power to impose a similar liability when the lapse is in furnishing a seaworthy ship. It is true that Congress has not intervened as to seaworthiness; yet there is no more reason to circumscribe more narrowly the duty, which *The Osceola, supra,* established as part of the maritime law, than the Constitution circumscribes the power of Congress, for both in the end are based upon the same provision. Moreover, we find confirmation for this in the 'obligation' of 'maintenance and cure' of a seaman injured on shore, for that is concededly quite as entirely the creature of the maritime law as the 'obligation' to furnish a seaworthy ship. For these reasons, although we have been unable to find a decision holding that a seaman, injured ashore by unseaworthy ship's gear, can recover, we have no doubt that he could; and, if a seaman can, we see no reason to question the ability of a longshoreman also to recover.''

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In misconstruing and extending the doctrine of *Seas Shipping Co.* v. *Sieracki* (*supra*) to cover a longshoreman injured on shore.

2. In failing to reverse the judgment of the District Court and dismiss the complaint in view of the findings of the Jury that Strika was contributorily negligent.

3. In failing to apply the rules of the forum in which the case was tried. Thus, since this case was tried in a common law forum, the finding by the Jury of the plaintiff's contributory negligence was a complete defense to the action.

4. In failing to hold that the plaintiff's rights, if any, were covered by the New Jersey State Workmen's Compensation Law.

5. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. This is the first time that the point involved on this appeal has been raised either in this Court or any other federal court. The burden placed by this decision on the shipping industry is unnecessarily heavy; unnecessary because longshoremen injured on shore are already covered by liability without fault statutes namely, State Workmen's Compensation Acts. The specific question on this appeal was expressly left open by the majority opinion in *Seas Shipping Co.* v. *Sieracki* (*supra*) at p. 99, footnote 17. The decision of the Court of Appeals is contrary to the implications and the indicated holding of this Court.

In *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, this Court held that a seaman injured on land by a shipowner's negligence had an actionable claim under the Jones Act on the ground that this was no more than a supplement to the remedy of cure and maintenance which was an incident of his employment by the ship. The question of whether a longshoreman had the same rights as a seaman to recover under the Jones Act for injuries on shore was specifically left open by this Court in the *O'Donnell* case.

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, 99, at footnote 17, this Court said:

> "In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a

matter which is relevant however in *Swanson* v. *Marra Brothers, Inc.*, No. 405, decided this day, 1946 A. M. C. 715. Cf. *O'Donnell* v. *Great Lakes Co.*, 318 U. S. 36, 1943 A. M. C. 149."

In *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, the unanimous opinion was written by Ch. J. Stone, who had dissented in the *Sieracki* case. In the *Swanson* case, a longshoreman injured on a pier, sought to recover under the Jones Act. His contention was that since he was a "seaman" under the decision of this Court in *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, and since this Court in the *O'Donnell* case (*supra*) held that a seaman injuried on a pier could sue to recover under the Jones Act, then the longshoreman was also entitled to sue. Obviously, if this Court intended for all purposes and in all places, to permit a longshoreman to have all of the attributes and protections of a seaman (in addition to those granted him by the Longshoremen and Harbor Workers' Act and State Compensation Acts), then the *Swanson* case would have come under the principle of the *O'Donnell* case. However, by a unanimous decision this Court held in the *Swanson* case that the longshoreman was not entitled to sue to recover under the Jones Act.

If the Court of Appeals holding in the instant case is correct, then a longshoreman should also be able to sue his employer under the Jones Act for injuries sustained on land such as was allowed to seamen under the *O'Donnell* case. The contrary to this, however, has been held by this Court in the *Swanson* case.

In the *Swanson* case (*supra*), this Court said (p. 6):

"The Act (Longshoremen's and Harbor Workers' Act) thus excludes from its benefits stevedores not

members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the Haverty case. Those provisions make it plain that Congress' own interpretation of the Jones Act is such as to preclude the extension of the doctrine of that case to the specified employees injured on land."

The Court then went on to quote from the Senate Judiciary Committee's Report made while considering the Longshoremen's and Harbor Workers' Act, which expressed doubt as to the constitutional power of Congress to allow recovery to such longshoremen injured on shore (p. 7):

"These men are mainly employed in loading, unloading refitting and repairing ships; but it should be remarked that injuries occurring in loading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States. Sen. Rep. No. 973 69th Cong., First Sess., p. 16."

The Court then concluded (p. 7):

"The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits recovery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel. *State Industrial Commission* v. *Nordenholdt Corp., supra; Smith & Son* v. *Taylor, supra; cf. Minnie* v. *Port Huron Co., supra.* And it leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board, *Warner* v. *Goltra,* 293 U. S. 155, 1934 A. M. C. 1436; *Norton* v.

Warner Co., 321 U. S. 565, 1944 A. M. C. 337; see *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 255-6, 1940 A. M. C. 327, or on shore, *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra.*"

Chief Justice Stone in his dissenting opinion in the *Sieracki* case apparently gives this Court's interpretation of the *Swanson* case (328 U. S. 106):

> "Wherever the injury occurs on navigable waters, Congress has given to longshoremen and harbor workers substantial rights to compensation against their employer for injuries inflicted without his fault. *South Chicago Co.* v. *Bassett*, 309 U. S. 251, 1950 A. M. C. 327. It has left them free to pursue their remedy for injuries resulting from negligence of third parties, including in this case the vessel and the furnishers of the defective shackle. Where the injury occurs on land they are free to pursue the remedy afforded by local law. *State Industrial Commission* v. *Nordenhold Corp.*, 259 U. S. 263; *Smith & Son* v. *Taylor*, 276 U. S. 179, 1928 A. M. C. 447; *Swanson* v. *Marra Brothers, Inc.*, No. 405, 1946 A. M. C. 715, decided this day." (Italics ours.)

So by the Supreme Court's interpretation of the *Sieracki* and *Swanson* cases, decided on the same day, the cloak of a seaman granted a longshoreman under the *Haverty* case, does not follow the longshoreman ashore but only remains on his shoulders while he is aboard ship.

In *Resigno* v. *Jarka Co., Inc.*, 248 N. Y. 225 (1928), Ch. J. Cardozo writing for the Court said (p. 234):

> "True, indeed, it is that the remedies available to a stevedore may thus vary from day to day, and even from hour to hour, with the location of his labor. Dis-

tinctions of that order are not unknown to the law. They have been made familiar by rulings under the Workmen's Compensation Acts by which a longshoreman is given a remedy if working on a boat and denied the same remedy if working on a dock (*State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263). So under the Employers' Liability Act of Congress. The servant gains a remedy or loses one according to the particular service he is rendering at the very moment of the injury (*Chicago, B. & Q. R. R. Co.* v. *Harrington*, 241 U. S. 177)."

2. Mr. Strika accepted the benefits of the New Jersey State Workmen's Compensation Act (R. 860-861):

> The New Jersey Workmen's Compensation Law (N. J. R. S. 34:15-7, et seq.) provides:
>
> 34:15-40. LIABILITY OF THIRD PARTY: Where a third person or corporation is liable to the employee or his dependents for any injury or death, the existence of a right of compensation from the employer or insurance carrier under this statute shall not operate as a bar to the action of the employee or his dependents. * * *
>
> (f.) * * * The legal action contemplated herein shall be a civil action at law in the name of the injured employee. * * *

A situation similar to the case at bar on this point was thoroughly considered and decided by the Court of Appeals, Second Circuit in *Netherlands American Steam Nav. Co.* v. *Gallagher*, 282 F. 171 (C. C. A. 2) (*supra*). In that case the plaintiff, a longshoreman and a resident of New Jersey, was injured in Hoboken, New Jersey on the same pier on

which the accident in this suit occurred. He was engaged in unloading cargo from a vessel owned by his employer, the Netherlands American Steam Nav. Co., a foreign corporation. The Court said (p. 173):

> "This case presents an interesting and important question, involving the jurisdiction of the Courts of the United States and the applicability of the laws of a state to the cause of action which the plaintiff asserts. As the plaintiff at the time of his injury was performing service as a stevedore in unloading an ocean steamer at her pier in Hoboken and the injury happened to him on the pier, it is necessary, in determining the issues involved to consider the limits of the admiralty and maritime jurisdiction of the federal courts."

The question was answered (pp. 183-184):

> "That the plaintiff being injured on the land the wrong was nonmaritime, and as such was not within the admiralty jurisdiction, and was not brought within it by the fact that he happened to be working at the time under a maritime contract. And as the wrong done was not within the admiralty jurisdiction, and was within the jurisdiction of the courts of the state within which the injury was inflicted, the Workmen's Compensation Act of New Jersey (P. L. 1911, p. 136) applies * * *."

Thus, Strike was limited by the provisions of the New Jersey State Workmen's Compensation Act to a civil suit in law against any possibile negligent third parties. The Jury disposed of this suit by finding that the plaintiff was contributorily negligent and that the defendant had no knowledge of the unsuitability of the bridles.

3. This action was tried in a common law court. This Court has many times held that depending on the forum of trial, depends the procedural law which governs the trial. In a common law court, the defense of contributory negligence is a complete bar to a recovery, in an admiralty court the defense is only partial.

In *Belden* v. *Chase,* 150 U. S. 674, this Court squarely held that the rule of contributory negligence in common law courts is altogether different from its application in the admiralty court. The Court affirmed that at common law, contributory negligence is a complete bar, whereas, in admiralty, it merely causes a division of damages. At page 691, this Court said:

> "The doctrine in admiralty of an equal division of damages in the case of a collision between two vessel when both are in fault contributing to the collision, has long prevailed in England and this country. *The Max Morris,* 137 U. S. 1. But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.,* 21 Wall. 389.
>
> "In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of."

The rule has been consistently followed. It has not been confined to collision cases.

In *Guerrini* v. *U. S.*, 167 F. 2d, 352, an injury case, the Court of Appeals for the Second Circuit re-affirmed the doctrine of the *Belden* case. The Court said:

> "Moreover, whether the defense (of contributory negligence) is total or partial depends upon the forum."

See:

In re Pennsylvania R. Co., 48 F. 2d 559;
Johnson v. *United States Shipping Board Emergency Fleet Corp.*, 24 F. 2d 963.

Thus, the Court of Appeals in the instant case not only refused to follow this Court's holding in *Belden* v. *Chase* (*supra*) but disregarded its own decision.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 23, 1951.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This action was tried on the Civil side of the United States District Court for the Southern District of New York before Honorable Irving R. Kaufman, U. S. D. J., and a jury. Judgment was entered after a special verdict of the jury under Rule 49 F. R. C. P.

Based upon the answers to seven questions submitted to the jury, judgment was rendered in favor of the plaintiff, Respondent here, and against the defendant, Petitioner in this Court, in the sum of $67,843.48 representing damages, costs and interest. The jury found that the damages were $75,000.00 and that the plaintiff contributed to the extent of ten (10%) percent to the happening of the accident (R. 1033).*

* References are either to folios or pages of the record unless otherwise indicated.

The cause of action was based on personal injuries sustained by plaintiff, a foreman of longshoremen, whose duties took him on board the vessel and some times to the dock (R. 58-59; 63). He sustained injury while on the wharf alongside the vessel, helping to replace certain large metal pontoon hatch covers aboard the vessel. In doing this, bridles supplied by the ship (R. 1031) were used and it was necessary to use the winches, booms and falls of the ship (R. 328). The bridles were unsuitable, in that they consisted of two separate devices rather than one (R. 547; 794; 910), as a result of which, one of the bridles jumped out of the hook of the fall (R. 86-87) after it had risen a few feet from the ground (R. 279) causing one end of the cover to fall (R. 86), striking plaintiff, causing injuries which necessitated the amputation of his right leg (R. 107). The questions submitted to the jury and the answers thereto are set forth in the record (R. 1031-1033) and are sufficiently summarized in the Petitioner's brief (Pet. brief, pp. 3-4).

Liability was imposed by the Trial Court on the basis of unseaworthiness, not negligence (R. 1127).

Reasons for Denying the Writ

1. Petitioner urges that this writ should be granted alleging that this is the first time that the point involved on this appeal has been raised in any Court. Respondent denies this, as will appear more fully below. However, if this question were an open one, it has become academic since the enactment of the amendment to the *Suits in Admiralty Act* (Public Law 685, 80th Cong., Second Sess.) [H.R. 238] which became law on June 19th, 1948 (1948 A.M.C. 1060). This Act, entitled: "*Extension of Admiralty Jurisdiction,*" reads in part:

> "That the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of

damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

The entire basis of petitioner's request for this writ is based upon the theory that since respondent was momentarily on the dock, the maritime law of the United States would not obligate the shipowner to provide him with a seaworthy vessel. This question, if not previously settled by judicial fiat, was certainly finally determined by the extension of the admiralty jurisdiction by amendment of the *Suits in Admiralty Act, supra.* It was the opinion of the United States Senate, according to its report appended to that Act, that the cause of action in favor of a person on land which was invoked in this case, always existed and was merely codified by the amendment to the Suits in Admiralty Act. The report states in part:

"Adoption of the bill will not create new causes of action. It merely specifically directs the Courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2 of the Constitution and already authorized by the Judiciary Acts." (1948 U. S. Code Congr. Service p. 1900.)

The Honorable the Secretary of the Navy concurred with the Senate Committee stating:

"H. R. 238 would extend the traditional admiralty jurisdiction to include damage occasioned by a vessel to land structures. At the present time, such causes of action have to be maintained on the common law side." (1948 U. S. Code Congr. Service p. 1900.)

The purpose of the bill was clearly stated by the Committee:

"The bill will bring United States practice respecting maritime torts into accord with that followed by the

> British, who by a series of statutes, beginning in 1840, have restored admiralty jurisdiction in situations of this character and brought the British law into harmony with that of most European countries." (1948 U. S. Code Congr. Service p. 1899.)

It is obvious therefore that the question which Petitioner seeks to argue, has, by statute, at least, become academic and if this case involved an accident which occurred subsequent to the amendment above referred to, the statute would, in the words of the majority of the Court of Appeals which affirmed this judgment:

> "Public law 695 of June 19th, 1948 has now probably laid all such doubts, but we think that it was not necessary in order to support a recovery in this particular situation" (185 F. 2d 555).

2. The decision of this Court in *Seas Shipping Co.* v. *Sieracki* (328 U. S. 85) has already decided this question. It is true that in the *Sieracki* case, *supra,* the longshoreman who was injured, was on board a vessel when the injury occurred and this Court, in its decision in the *Sieracki* case, pointed out in a footnote (footnote 17, p. 99) that the Court was not there "concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work. * * *"

Obviously, in the *Sieracki* case, this precise point was not presented for adjudication. The underlying principle, however, that a longshoreman, doing work traditionally done by a seaman, was entitled to the same protection as a seaman as regards the seaworthiness of the vessel was there decided. This Court answered that question in the affirmative. It appears from a careful analysis of that decision that this Court would not have come to any other conclusion if the longshoreman in that case had been on land rather than on the ship. As a matter of fact, it would appear from the decision of this Court in *O'Donnell* v.

Great Lakes Co. (318 U. S. 36), that the same conclusion would ensue if the longshoreman were on land, since the *O'Donnell* case involved injuries to a seaman injured on the wharf alongside the ship.

If a longshoreman while working aboard a vessel, doing the work of a seaman, is entitled to the same protection as a seaman as regards a seaworthy vessel (*Sieracki* case), and if a seaman, while working on the wharf alongside his ship, is entitled to a seaworthy vessel (*O'Donnell* case), it would seem to follow with the simplest logic, that the longshoreman while working on the wharf, is entitled to indemnity if he is injured by reason of the unseaworthiness of the vessel or her gear.

The petitioner's argument is apparently based on a false premise. This applies to all of the questions upon which petitioner urges that this writ should be granted. The nub of this error is that petitioner has refused to accept the fact that liability in this case is based not upon negligence, but upon unseaworthiness.

Petitioner argues further that this Court's decision in *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, is authority for denying recovery to the plaintiff in this case. This argument evinces a complete misunderstanding of this Court's decision in the *Swanson* case. The *Swanson* case merely held that the longshoreman could not sue his employer under the Jones Act because of the operation of the State Compensation Act which provided that as between the longshoreman and his employer, the Compensation Act was the longshoreman's only remedy. The *Swanson* case in no way touched upon the liability existing between a longshoreman and a third party not his employer, which was passed upon in the *Sieracki* case.

It is respectfully submitted that while the narrowly defined issue here presented may not have been specifically ruled upon by this Court in so many words, this Court has clearly set forth the rule of law to be followed in a

series of cases beginning in 1902. Commencing with its decision in *The Osceola* (189 U. S. 159), which flatly held for the first time that the Maritime Law of the United States coincided with the general Maritime Law of the commercial world, this Court held that a seaman was entitled to full indemnity where his injuries were occasioned by the unseaworthiness of a vessel or its gear.

In 1926 in *International Stevedoring Co.* v. *Haverty* (272 U. S. 50, 71 L. ed. 157, 47 S. Ct. 19), this Court held that a longshoreman was clothed with the rights of a seaman in certain situations. The Court based its opinion on the philosophy of the law, in its endeavor to place the burden of the cost of injury where such burden could be best borne. Following the *Haverty* case, *supra,* the *Sieracki* case in 1946 held flatly that a longshoreman engaged in loading or discharging a vessel was doing the work of a seaman; that he was entitled to the same protection as a seaman while engaged in such work and held that where a longshoreman sustains injury as the result of an unseaworthy vessel, he was entitled to indemnity by the owners of the vessel, regardless of negligence or fault. At the same time, the Court held in the *O'Donnell* case, *supra,* that one of the rights of a seaman was to be protected against an unseaworthy vessel, whether he was on the vessel at the moment or momentarily on the wharf alongside it. Coupling the reasoning of this Court in the *Sieracki* case with that in the *O'Donnell* case, it seems clear that a longshoreman in the position of the seaman in the *O'Donnell* case, would be entitled to be warranted a seaworthy vessel when engaged in work in conjunction with that vessel, even though he was momentarily not on the vessel.

3. The operation of the New Jersey State Workmen's Compensation Act, urged by petitioner as a defense to the action, and a reason for the granting of this writ, does not in any way affect the liability of the third person,

the owner of the vessel, to the seaman. Like all other compensation acts, it defines and makes exclusive the rights of the employee against the employer (N. J. R. S. 34:15-7, *et seq.*). Petitioner urges that since the injury was occasioned while the plaintiff was on the wharf, the action was non-maritime in nature and would be controlled exclusively by local State law regarding negligence without any reference to unseaworthiness. The question is rather whether a form of liability without fault will be applied in a certain set of circumstances.

It is submitted that the requirement to furnish a seaworthy vessel is one which attaches to the privilege of owning and operating a vessel and has no reference to local State law. Rather it is a duty or obligation pressed upon the owner of a vessel in licensing him to own and operate it. It is submitted that it was upon this principle that the *Sieracki* case was decided and not upon the principle as to whether the longshoreman was aboard the vessel or on the wharf.

Also in this point, the petitioner seems to have confused the word "Admiralty" with the word "Maritime". Before the *Extension of the Suits in Admiralty Act, supra,* at the time when this accident happened, Strika could not have enforced his claim in the forum known as the "Admiralty Court" but the "maritime" right which was the basis of the liability was enforcible at law. This Court so stated in the *Sieracki* case, *supra,* at page 88.

> "It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the Court. *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, 259."

4. Petitioner also urges that the finding that plaintiff contributed to the accident to the extent of ten (10%) percent is a complete bar to this action.

Petitioner has not urged this question either in the District Court or in the Circuit Court of Appeals. Here again, petitioner has confused the basis of this cause of action which is "unseaworthiness" with the general rules applying to "negligence". Contributory negligence has never been a bar to a suit based on unseaworthiness but may be considered only in mitigation of damages. This Court has so held on numerous occasions. It will be recalled that in the *Sieracki* case, *supra*, the Court said in a footnote (footnote 11):

> "Contributory negligence has never been a defense in suits brought by seamen to recover for injuries due to a ship's unseaworthiness but has been applied merely in mitigation of damages."

The case of *Belden* v. *Chase*, 150 U. S. 674, decided in 1893, cited by petitioner in support of its application, involved negligence not unseaworthiness. Similarly, in *Guerrini* v. *U. S.*, 167 F. 2d 352, the case involved negligence not unseaworthiness.

On the other hand, this Court in *Socony Vacuum Oil* v. *Smith*, 305 U. S. 424, 429, 59 S. Ct. 262 (1938) said:

> "Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages."

Also in *The Arizona* v. *Anelich*, 298 U. S. 110, 122, this Court said:

> "Before the Jones Act contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment."

From these citations, it is obvious that petitioner's conclusion that the Court of Appeals refused to follow this

Court's holding in *Belden* v. *Chase, supra,* and disregarded its own decision, is completely fallacious and is based upon petitioner's confusion between a cause of action based on unseaworthiness such as the instant case and one based upon negligence.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

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